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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

Nos. 520, 491 Misc.

HOLLAND FURNACE COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION.

ON PETITION, AND ON MOTION FOR LEAVE TO FILE PETITION, FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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If the arguments of the Federal Trade Commission, set forth by its present spokesmen, are accepted, the Federal Trade Commission will, without benefit of further legislation, have extended its jurisdiction not only to those *local* aspects of a business which merely *affect* commerce, but also to *all* aspects of businesses which conduct interstate transactions.

Prior to the decision of the court below, the Federal Trade Commission had no such jurisdiction, and, unless this Court is prepared to permit the Commission to legislate for itself, petitioner is convinced that it does not have such jurisdiction today.

At pages 8 and 9 of its Brief, the F. T. C. states:

> "Moreover, it is well settled that the unfair competitive methods that the Act condemns need not themselves be in interstate commerce, as long as they further an interstate business that competes with other businesses. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483; *Federal Trade Commission* v. *Keppel & Bros. Inc.*, 291 U. S. 304."

This is a grossly erroneous statement. It is precisely the contention which was rejected in *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, where the F. T. C. argued that it had jurisdiction over methods used in local sales because the local seller was thereby enabled to compete unfairly with out-of-state manufacturers (312 U. S. at 349-350). Bunte Bros. was also an "interstate business", but the determinative question there, as it is here, was whether the alleged unfair method of competition was employed *in* commerce (312 U. S. 355).

Not even the earlier *Winsted Hosiery* and *Keppel & Bros.* cases, cited by the Commission, support its statement. In *Winsted Hosiery* the deceptive labels, and in *Keppel & Bros.* the gambling devices and arrangement, were an integral part of goods shipped in interstate commerce, and this fact was determinative.

Nor do cases such as *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291, or *United States* v. *South-Eastern Underwriters*, 322 U. S. 533, support the conclusion that all aspects of an interstate business are "in commerce". The *Binderup* case, which arose under the Sherman Act, is wholly different factually. There, goods manufactured in one state were shipped to residents of another state pursuant to contracts through an agent residing in the same state as the ultimate recipients. Clearly then, the entire

transaction was in interstate commerce. The *South-Eastern Underwriters* case dealt with the construction of the Sherman Act and with the scope of the *federal commerce power*, neither of which is limited to matters in commerce. The other cases relied upon by the F. T. C. are similarly inapplicable.

The Commission would have the Court ignore the Fair Labor Standards Act cases such as *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, and *Higgins* v. *Carr Bros.*, 317 U. S. 572 (not to mention *Dominech* v. *Pan American Standard Brands*, 147 F. 2d 994 cited at pages 11-12 of the petition which the F.T.C. ignores). The attempted distinctions urged by the Commission are wholly without merit. In both *Jacksonville Paper* and *Carr Bros.*, the employer (i.e. the "local distributor") was engaged in interstate commerce. The question determined was whether or not particular employees of these companies were engaged in commerce. Essentially that is the question before this Court in this case. The *Dominech* case directly disposes of the contention that a distinction may be drawn on the basis of the ownership of the "local distributor", for there, as here, the local distributor was owned by the out-of-state manufacturer, and there, as here, some aspects of the business were local, and not "in commerce".

The meaning of the phrase "in commerce" is clear. The Commission is limited to preventing the use of unfair methods of competition "in commerce". Even if they are deemed unfair, the methods employed by petitioner are not "in commerce" and are not subject to the Commission's jurisdiction.

If the jurisdiction of the Commission is to be extended by the Courts, rather than by Congress, the least that those affected by such an extension are entitled to is review by this Court.

Respectfully submitted,

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